September 4, 2003

TO: Allan W. Klein
Administrative Law Judge
Office of Administrative Hearings
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Minneapolis, MN 55401-2138

Reinhardt Comments regarding the Minnesota Environmental Quality Board's Proposed Permanent Rules Governing Environmental Review of Electric Power Generating Plants and High Voltage Transmission Lines in Proceedings Before the Public Utilities Commission, *Minnesota Rules* parts 4410.7010 to 4410.7070, and Repeal of *Minnesota Rules* parts 4410.7000 to 4410.7500

A. BACKGROUND.

The Minnesota Environmental Quality Board (EQB) published proposed Rules 4410.7010 to 4410.7070 in the Minnesota State Register on May 19, 2003; we submitted our written comment on June 18, 2003. On August 25, 2003, the EQB distributed revised language for these rules in response to issues and concerns raised by commenters. The EQB has informed commenters that it will recommend the revised language for adoption at the rulemaking hearing, and that all original written comments will be filed as exhibits into the record of this rulemaking proceeding.

Therefore, our comments today are based on the EQB's August 25, 2003 version of the proposed rules. We wish to thank the EQB for its consideration and response to many of the issues we raised in our June comment. If the EQB's August 25, 2003 version of the proposed Rules is for some reason not accepted into the record by the ALJ as the actual proposed language for this rulemaking proceeding, then we restate our June 18, 2003 written comment as if fully set forth herein.

Unfortunately, many important elements of the EQB's revised version of proposed rules are not justifiable, which presents an unbecoming agency posture of opposition to public participation and fair dealing. Our specific objections follow.

B. STATE AGENCIES INVOLVED IN REGULATORY PROCEEDINGS "ARE REQUIRED BY STATUTE TO CONSIDER BOTH THE ECONOMIC IMPACT AND ENVIRONMENTAL IMPACT IN RENDERING DECISIONS DEALING WITH ENVIRONMENTAL MATTERS."[1]

The existing rules for environmental review in certificate of need (CON) proceedings before the Minnesota Public Utilities Commission (PUC) require analysis of "economic, employment and environmental impacts of the proposal and reasonable alternative facilities." (Minn. Rule 4410.7100, subp. 3(C); 4410.7500, subp. 3(C)). For reasons never explained in its Statement of Need and Reasonableness (SONAR), the EQB dropped "economic, employment and environmental impacts" from its definition of impacts to be included in the environmental report at certificate of need, and instead substituted the vague and undefined phrase "human and environmental impacts" throughout the proposed rules. (Amazingly, the word "economic" is not found anywhere in the EQB's 34 page SONAR.)

In response to our June 18, 2003 written comment where we criticized substitution of the phrase "human and environmental impacts" in place of the existing "economic, employment and environmental impacts," the EQB stated that "Use of a more deliberative process involving the public to determine the appropriate scope of the environmental report will ensure that the document addresses the matters that should be addressed." (Explanation of Changes Supported by EQB Staff, 8/25/03, p. 4.) The EQB's explanation of this change is neither instructive nor relevant, because the public cannot be held responsible to raise issues in the record that are already mandated by statute. The EQB's position seems to be that if the public doesn't raise economic issues in the scoping process for the environmental report, then the report won't include them.

However, this is not an option under Minnesota law because—as we explained in our initial comment—economic impact is a required statutory element in environmental review proceedings and documents. (Minn. Stat. § 116D.04, subd. 2a). That's why it's included in the current rules for environmental review at certificate of need (4410.7100, subp. 3(C); 4410.7500, subp. 3(C)) and why it must be carried forward into the rules that are intended to replace them.

The EQB cites Minn. Stat. § 116D.04, subd. 5a, as its statutory authority for adopting rules governing environmental review (SONAR p. 6). This statute explicitly states that the EQB must promulgate rules "**in conformity with this chapter**." The cited statute further specifies that the scoping process must conform to subdivision 2a(e), and *that* statute references "a discussion of those impacts," that are set forth in the first paragraph of subdivision 2a, which

[1] Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 841 (Minn. 1977).

explicitly **includes** economic impacts. In addition, Minn. Stat. 116D.03, entitled "Action by State Agencies," requires that "the policies, **rules** and **public laws** of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06." The EQB's proposed rules fail this statutory mandate by excluding economic impact from the required elements for environmental review.

Another reason the EQB cannot defy the Environmental Policy Act by removing "economic impacts" from its definition of impacts to be considered in environmental review at certificate of need is found in Minn. Stat. § 116D.04, subd. 6, which provides that, "economic considerations alone shall not justify" the development of a project that will significantly affect the quality of the environment. It would obviously be impossible to determine the import of economic considerations to the need rationale for a proposed project if the environmental report does not undertake an analysis of those impacts.

The EQB cannot promulgate rules that disregard statutory mandates and then insist that a "deliberative process involving the public" will somehow make up for excluding the plain language of the law. Economic impacts are a vital consideration at certificate of need, because that is the only venue in which issues of size, type, timing, configuration and alternatives will be addressed. (SONAR pp. 2-3)

- What are the economic effects (positive and negative) of the proposed energy facility(ies) and each feasible alternative?

- Would generation located near load be economically superior to proposed transmission facilities (and vice versa)?

- Will the proposed energy facilities (whether generation or transmission) be used to fulfill state/local energy needs, or are they "merchant" in nature to enable the sale of electricity into the deregulated national wholesale power market? (If it will serve both state and bulk power transfer needs, then what proportion is attributed to each use?)

- What are the probable costs to acquire private lands for construction of proposed transmission facilities?

- Will proposed transmission facilities drive down the value of adjacent private properties? (This problem is commonly asserted by power line opponents, and property value diminution was, in fact, documented by the EQB when it prepared its Revised Environmental Impact Assessment for the Chisago Electric Transmission Line Project (1999) ***following public comments at hearing***.)

The elements of "economic, employment and sociological" impact are so commonly included in environmental review documents that the EQB's revised language for proposed Rule 4410.7030, subp. 6, lists those exact items as elements to be considered by the board. (As stated above, these elements are common *because* they are set forth in environmental law.) It is beyond comprehension why the EQB is attempting to remove economic impacts from the rules governing environmental review at certificate of need in defiance of Minnesota Statutes—and the EQB certainly doesn't bother to explain itself in this regard.

Further, the EQB is not allowed to delete the economic element from its proposed rules for environmental review, because Minnesota's highest court has soundly rejected that approach.

> We have previously indicated that state agencies and courts are required by statute to consider both the economic impact and the environmental impact in rendering decisions dealing with environmental matters. Minn. St. 116.07, subd. 6; 116B.04; 116B.09, subd. 2; 116D.02, subd. 1; 116D.03, subd. 2(c); 116D.04, subd. 6.

Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 841 (Minn. 1977).

The statutory mandate is crystal clear, and the ALJ must direct the EQB to bring these proposed rules into compliance. A requirement to analyze the economic impacts relating to a proposed energy facility must be codified in these rules, just as they are in the exiting rules that the EQB proposes to repeal in this action.

C. NOTICE CONTENT MUST INCLUDE (1) DEFINITION OF "PERTINENT INFORMATION" AND (2) ADVICE FOR ADDING INTERESTED PERSONS TO EQB'S MAILING LIST FOR THE PROCEEDING.

1. THE TERM "PERTINENT INFORMATION" MUST BE DEFINED.

The EQB added a new notice content requirement in its August 25, 2003 revised language to include "a statement informing the public where copies of the pertinent information may be reviewed and copies obtained." (Proposed Rule 4410.7030, subp. 2(E)) It is unclear by this language what the EQB considers to be "pertinent information," and the rule must set forth the exact items to be included. In addition to the certificate of need application itself, "pertinent information" must reference the laws and rules that will govern environmental review in the certificate of need proceeding, so that interested

persons may quickly research the proper procedures and participate effectively within the appropriate legal parameters. The EQB came halfway on this issue by adding subpart 2(E), but it must complete the task by listing exactly what "pertinent information" means.

2. How Can An Interested Person Add His Or Her Name To The EQB's Mailing List For Further Notices Regarding The Proceeding?

Another element that must be included in the notice content is information on how an interested person may add his or her name to the EQB's mailing list to receive notification of (a) the chair's scoping order pursuant to proposed rule 4410.7030, subp. 8, and (b) the completion and availability of the environmental report pursuant to proposed rule 4410.7030, subp. 10. The EQB points out that "Not all persons who got the original notice about the public meeting will be notified automatically. These persons will have to take some initiative to let the EQB know that they want to continue to receive notices about the project." (SONAR, p. 24) Obviously, the EQB needs to "take some initiative" to inform the public that this step is required when it issues the initial public notice.

D. The Alternative of Upgrading Existing Facilities Must Be Included In The List of Alternatives That Will Be Addressed In The Environmental Report.

The EQB claims that "The list of alternatives that will be addressed in the environmental report included in the rule language comes from the PUC rules regarding certificate of need application. Minn. Rules parts 7849.0250B and 7849.0260B." (SONAR, p. 25) Despite this claim, the EQB left a critical alternative *out* of its proposed rule (4410.7035, subp. 1(B)) describing items that must be included in the environmental report: the alternative of **upgrading existing transmission lines or existing generating facilities** rather than building new ones.[2] (See Minn. Rule 7849.0250(B)(2) and 7849.0260(B)(2)). Perhaps the EQB simply forgot to carry this item into its proposed rules, but the alternative of upgrading existing facilities is an essential component of environmental review and report at certificate of need, and must be added to these rules.

[2] The alternative of upgrading existing facilities is also a critical issue when considering cost (economic) implications during environmental review, as required by statute.

E. THE EQB CANNOT BE ALLOWED TO REPEAL THE PUBLIC'S RIGHT TO OBTAIN RESPONSE FROM THE RESPONSIBLE GOVERNMENTAL UNIT.

Finally, we come to the critical public right that the EQB seeks to **repeal** in this rulemaking: the right of Minnesota citizens to receive a written, on-the-record response from the responsible government unit to substantive issues raised in a state energy regulatory proceeding that will directly impact citizens and communities.

Current Rule 4410.7100, subp. 7, states that:

> Comments on the draft environmental report shall be received during and entered into the record of hearing conducted under Minnesota Statutes, section 216B.243. **The Public Utilities Commission shall respond to the timely and substantive comments on the draft environmental report**.

Subpart 8 of that section goes on to define the "final report" as:

> The draft environmental report, **any comments received during the hearings, and responses to the timely substantive comments** shall constitute the final environmental report.

By attempting to repeal these sections of existing law without offering any type of replacement language in its proposed rules, the EQB is attempting to conduct environmental review by edict, and to ***erase*** the public's involvement and influence in environmental review at certificate of need. The EQB's proposed rules invite the public to participate in deciding the *scope* of environmental review, but not in shaping the agency's final report. The EQB's proposed rules do not invite public comment on the environmental report that it produces, nor do they provide for any record response to public comments!

The EQB explains the current certificate of need practice in its SONAR:

> The draft environmental report must be distributed in accordance with EQB rules, and ***the public must be afforded an opportunity to submit written comments in response. The applicant must then reply in writing to the comments.*** * * * With regard to power plants, the process is different * * * [in that] the Public Utilities Commission directs the Department of Commerce to prepare an environmental

report. ***Notice is given when the draft environmental report is available and the Department of Commerce responds to any comments that are received.***

SONAR, p. 3. The EQB does not offer a single excuse why it should be allowed to repeal existing Rule 4010.7100, subparts 7 and 8 (and also subpart 2, which mandates that public comments on the environmental report be included in the hearing record), or why its environmental report should be exempt from public comment and scrutiny. We emphatically object to any such repeal. These existing subparts must be preserved and, in fact, would not alter the certificate of need timeline from that contained in current rules in any way.[3] The EQB could be designated as the responding agency in subpart 7 instead of PUC, but otherwise, the language of existing rules 4010.7100, subparts 2, 7 and 8 should remain intact and must be preserved in the new rules.

The EQB won't even commit to party status in the CON proceeding, which would allow public examination and required responses—under oath—in a contested case proceeding before an administrative law judge. All the EQB offers is that it will "participate in the PUC proceeding and be available to answer questions about the environmental report or environmental assessment or EIS and respond to comments about the document." (8/25/03 Proposed Rule 4410.7050, subp. 1) *What could this language possibly mean?* There is no provision in the proposed rules to solicit public comment on the EQB's environmental report. There is no provision for the EQB to respond in writing. There is no provision for its responses to become part of the hearing record which "must be considered by PUC in making a final decision on a certificate of need or HVTL certification request." (Id.) There is no provision for the EQB to take the stand in a contested case proceeding to answer to the public concerning its environmental report. As the drafter of important documents that are entered into the public record of a state regulatory proceeding, the EQB must be a formal party to that proceeding, and this obligation (as well as the obligation to respond—in writing and on the record—to public comment) must be codified in these rules.

The EQB cannot strip away citizens' rights to fully participate in government proceedings held to evaluate proposed new energy infrastructure, or citizens' rights to receive a meaningful response—in writing, on the record—concerning

[3] In looking over the EQB's proposed timeline diagram for these rules, we note that its environmental report will be available by the time public hearings are held on the certificate of need application. Thus, the current language of Rule 4010.7100, subparts 2, 7 and 8 would dovetail with the timeline envisioned by the EQB and preserve the public's rights as contained in existing law.

substantive issues and alternatives raised in the proceeding. Do not forget that a certificate of need proceeding is a state regulatory process to analyze proposals for the construction of large, polluting energy facilities in citizens' neighborhoods and even in our own back yards.

The ALJ must reject the EQB's cynical attempt to **repeal** citizens' rights in certificate of need proceedings, and must preserve the provisions of current Rules 4410.7100, subparts 2, 7 and 8 in these new rules.

F. CONCLUSION.

The EQB has made headway in crafting a constructive process for environmental review at the certificate of need stage of proceedings to evaluate proposals for new energy infrastructure. However, it is attempting to **repeal** numerous items from the current law that are critical to ensure the public has an opportunity to meaningfully participate in and influence the outcome of that process. We are grateful to our fellow citizens who have joined us in requesting this rulemaking hearing, which will give the Administrative Law Judge an opportunity to correct serious mistakes made by the EQB. We believe the final rules that emerge from this hearing process will be far superior to the rules that the EQB sought to enact without any public hearing, but we still expect them to be at least as good as the rules they are to replace. We call on the ALJ to reject the anti-citizen impacts of the EQB's proposals as outlined in this comment, and to preserve citizens' rights in state government proceedings that will directly affect private and public interests.

Respectfully,

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